

***DISTRICT OF MAINE***

***Docket No. 00-169-B***

## REPORT AND RECOMMENDED DECISION<sup>2</sup>

The plaintiff in this Social Security Disability (“SSD”) appeal raises several questions: whether the administrative law judge improperly failed to find that she suffered from the severe impairments of chronic pain syndrome and depression; whether the administrative law judge improperly evaluated the plaintiff’s testimony concerning her pain; whether the administrative law judge erred in finding that the plaintiff could return to her past relevant work; and whether the Appeals Council erred by failing to overturn the decision of the administrative law judge based on evidence submitted to it by the plaintiff after the administrative law judge had issued his decision. I recommend that the court vacate the commissioner’s decision and remand for further proceedings.

<sup>1</sup> Pursuant to Fed. R. Civ. P. 25(d)(1) Acting Commissioner of Social Security William A. Halter is substituted as the defendant in this matter.

<sup>2</sup> This action is properly brought under 42 U.S.C. § 405(g). The commissioner has admitted that the plaintiff has exhausted her administrative remedies. The case is presented as a request for judicial review by this court pursuant to Local Rule 16.3(a)(2)(A), which requires the plaintiff to file an itemized statement of the specific errors upon which she seeks reversal of the commissioner's decision and to complete and file a fact sheet available at the Clerk's Office. Oral argument was held before me on April 6, 2001, pursuant to Local Rule 16.3(a)(2)(C) requiring the parties to set forth at oral argument their respective positions with citations to relevant statutes, regulations, case authority and page references to the administrative record.

In accordance with the commissioner's sequential evaluation process, 20 C.F.R. § 404.1520; *Goodermote v. Secretary of Health & Human Servs.*, 690 F.2d 5, 6 (1st Cir. 1982), the administrative law judge found, in relevant part, that the plaintiff remained insured for disability purposes through December 31, 2001, Finding 1, Record at 19; that she had not engaged in substantial gainful activity since March 14, 1997, Finding 2, *id.*; that she suffered from left lateral epicondylitis,<sup>3</sup> an impairment that was severe but did not meet or equal the criteria of any of the impairments listed in Appendix 1 to Subpart P, 20 C.F.R. Part 404, Finding 3, *id.*; that her statements concerning her impairment and its impact on her ability to work were not entirely credible, Finding 4, *id.*; that she lacked the residual functional capacity to lift and carry more than 20 pounds with her right arm or more than several pounds with her left arm, perform repetitive motions involving the left elbow and forearm, and perform tasks requiring intense concentration, Finding 5, *id.*; that in her past work as a data entry clerk the plaintiff was not required to lift more than 10 pounds, tasks were not so complex as to require intense concentration, and her tasks could be adapted to minimize use of her left arm as more than a guide, Finding 6, *id.*; that her past relevant work did not require the performance of work functions precluded by her impairment and that her impairment did not prevent her from performing her past relevant work, Findings 7-8, *id.* at 20; and that the plaintiff had not been under a disability at any time through the date of the decision, Finding 9, *id.* The plaintiff submitted additional documents to the Appeals Council after the administrative law judge issued his decision. *Id.* at 7, 146-77. The Appeals Council considered these materials but declined to review the decision, *Id.* at 5-6, making it the final decision of the commissioner, 20 C.F.R. § 404.981; *Dupuis v. Secretary of Health & Human Servs.*, 869 F.2d 622, 623 (1st Cir. 1989).

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<sup>3</sup> Lateral epicondylitis is an inflammation often referred to as "tennis elbow." *EEOC v. Humiston-Keeling, Inc.*, 227 F.3d 1024, 1026 (7th Cir. 2000).

The standard of review of the commissioner's decision is whether the determination made is supported by substantial evidence. 42 U.S.C. § 405(g); *Manso-Pizarro v. Secretary of Health & Human Servs.*, 76 F.3d 15, 16 (1st Cir. 1996). In other words, the determination must be supported by such relevant evidence as a reasonable mind might accept as adequate to support the conclusions drawn. *Richardson v. Perales*, 402 U.S. 389, 401 (1971); *Rodriguez v. Secretary of Health & Human Servs.*, 647 F.2d 218, 222 (1st Cir. 1981).

## **Discussion**

### **A. Chronic Pain Syndrome and Depression**

At Step 2 of the sequential evaluation process, the administrative law judge found that only the plaintiff's left lateral epicondylitis was a severe impairment. The plaintiff contends that she also suffered from the severe impairments of chronic pain syndrome and depression. The claimant bears the burden of proof at this step, but it is a *de minimis* burden, designed to do no more than screen out groundless claims. *McDonald v. Secretary of Health & Human Servs.*, 795 F.2d 1118, 1123 (1st Cir. 1986). When a claimant produces evidence of an impairment, the commissioner may make a determination of non-disability at Step 2 only when the medical evidence "establishes only a slight abnormality or combination of slight abnormalities which would have no more than a minimal effect on an individual's ability to work even if the individual's age, education, or work experience were specifically considered." *Id.* at 1124 (quoting Social Security Ruling 85-28).

The plaintiff's treating physician did diagnose chronic pain syndrome. Record at 137, 140, 141, 142, 143, 144, 148, 160, 161, 162, 164, 175, 176. However, as the administrative law judge noted, medical evidence in the record also suggests that the chronic pain syndrome is secondary to the left lateral epicondylitis. Record at 15 (administrative law judge decision); 26, 117-24 (physical residual functional capacity assessment performed by Charles Burden, M.D.). The administrative law

judge also noted, *id.* at 16, that Dr. Peter K. Esponnette, a rehabilitation specialist to whom the plaintiff was referred by her treating physician, stated that “she appears to have developed some degree of cumulative trauma disorder [subsequent to the lateral epicondylitis], which is most likely due to altered biomechanics with associated protection of the left elbow,” *id.* at 125-26. The treating physician refers to the plaintiff’s chronic pain syndrome as being “from her lateral epicondylitis.” *Id.* at 137. He refers to her “lateral epicondylitis with chronic pain syndrome,” *id.* at 140, and never discusses what he refers to as “chronic pain” or “chronic pain syndrome” in connection with anything other than the plaintiff’s left arm. Under these circumstances, the administrative law judge’s decision to decline to find the chronic pain syndrome “as such,” *id.* at 16, a separate severe impairment has substantial support in the record. The pain associated with the medically-determined impairment in the plaintiff’s left arm will be considered with respect to the left lateral epicondylitis, whether or not the pain is separately categorized as a distinct impairment. The administrative law judge did not err in this regard.

The analysis is somewhat different with respect to the plaintiff’s claim of depression, although the result is the same. Depression was also diagnosed by the plaintiff’s treating physician, who prescribed medications to treat it. *Id.* at 143, 145, 148, 149, 155, 164, 169, 174, 175. The administrative law judge stated that he found that the plaintiff’s depression was not severe at Step 2 primarily because the plaintiff characterized her depression as “mild” in her testimony and chose not to seek counseling. *Id.* at 15. In response to the question whether she knew why the drug Paxil had been prescribed for her, the plaintiff testified, in part: “I believe that’s what [the physician] used it for was a kind of a combination of a mild depression and to see if it would help with the pain, to alleviate it a little bit.” *Id.* at 191. While the administrative law judge erred to the extent that he relied on the claimant’s characterization of her mental condition to override the otherwise uncontradicted medical

evidence concerning her depression, *see* Social Security Ruling 85-28, reprinted in *West's Social Security Reporting Service* Rulings 1983-1991, at 393, that error appears harmless in this case. The administrative law judge completed a psychiatric review technique form, Record at 21-23, as required by 20 C.F.R. § 404.1520a, and the conclusions recorded on the form concerning the “B” criteria, Record at 22-23, are supported by the medical evidence. Accordingly, the administrative law judge’s finding that the depression was not severe is not erroneous. 20 C.F.R. § 404.1520a(c); *Figueroa-Rodriguez v. Secretary of Health & Human Servs.*, 845 F.2d 370, 374 (1st Cir. 1988).

### **B. Pain**

The plaintiff contends that the administrative law judge erroneously failed to give controlling weight to her treating physician’s opinion “of the nature and severity of [her] impairments,” Plaintiff’s Itemized Statement of Specific Errors (“Statement of Errors”) (Docket No. 3) at 6, with respect to the support given by that opinion for her testimony concerning the degree of pain from which she suffered. The argument is a bit difficult to follow. The question whether a physician’s opinion is to be given controlling weight is ordinarily treated separately from the question whether a claimant’s testimony concerning her pain is to be fully accepted. The applicable regulation provides: “If we find that a treating source’s opinion on the issue(s) of the nature and severity of your impairment(s) is well-supported by medically acceptable clinical and laboratory diagnostic techniques and is not inconsistent with the other substantial evidence in your case record, we will give it controlling weight.” 20 C.F.R. § 404.1527(d)(2). The only opinion of her treating physician offered by the plaintiff in support of her allegations of pain and with respect to this regulation, Statement of Errors at 6, is the treating physician’s statement that the plaintiff “is completely disabled by her chronic pain syndrome and that this is permanent,” Record at 176. In addition to the fact that this opinion is inconsistent with other substantial evidence in the record, *e.g.*, *id.* at 110, 118, the plaintiff

acknowledges, Statement of Errors at 6, that the opinion of a treating source that the claimant is disabled is not binding on the commissioner, 20 C.F.R. § 1527(e); *see also Barrientos v. Secretary of Health & Human Servs.*, 820 F.2d 1, 2-3 (1st Cir. 1987). She nonetheless argues that this opinion is “evidence that she has a severe impairment.” Statement of Errors at 6. Since the plaintiff does not contend that her pain alone is a severe impairment, the point of this argument is not clear.

The plaintiff may mean to argue that the administrative law judge erroneously discounted her testimony concerning the severity of her pain, as is suggested when she states that “[t]here is no evidence in the record, whatsoever, to support,” *id.*, the administrative law judge’s statement that her description of her pain as “up to the 9 or 10 range” on a scale of 10 suggests a level of pain that “is commonly associated with a trip to an emergency room for relief, yet no such emergency treatment is reflected in the record,” Record at 17. If that is in fact the plaintiff’s argument, the administrative law judge sufficiently states his reasons, in addition to the one cited by the plaintiff, for discrediting her testimony concerning the severity of her pain. *Id.* at 17-18. *See Social Security Ruling 96-7p*, reprinted in *West’s Social Security Reporting Service Rulings 1983-1991* (Supp. 2000-01), at 133-42; *see generally Gray v. Heckler*, 760 F.2d 369, 374 (1st Cir. 1985).

### **C. Past Relevant Work**

The administrative law judge’s decision that the plaintiff could return to her past relevant work was made at Step 4 of the sequential evaluation process. 20 C.F.R. § 404.1520(e). The burden of proof remains with the claimant at this stage. *Santiago v. Secretary of Health & Human Servs.*, 944 F.2d 1, 5 (1st Cir. 1991). The plaintiff points out that the administrative law judge found that her “capacity for light work is diminished by significant non-exertional limitations which make it impossible for her to perform repetitive motions involving the left elbow and forearm and moderately difficult to concentrate and attend to work tasks on a sustained basis,” Record at 18, yet also found that

she could return to her past relevant work as a data entry clerk, because “her tasks could be adapted to minimize use of her left arm as more than a guide” and “[t]asks were not so complex as to require intense concentration,” *id.* at 19. This conclusion is apparently based on the testimony of the vocational expert who opined that a data entry clerk could perform that job using only one hand. *Id.* at 207-10. The vocational expert did not offer any statistical evidence concerning the number of one-handed data entry clerks currently working in the national economy.

The plaintiff also points out that the job of data entry clerk as defined in the *Dictionary of Occupational Titles* (U. S. Dep’t of Labor, 4th ed. Rev. 1991) includes the following physical demands: performing repetitive or short-cycle work; attaining precise set limits, tolerances and standards; frequent reaching and handling (from 1/3 to 2/3 of the time); and constant fingering (2/3 or more of the time). While the definition does not specifically mention the possibility of performing these tasks with only one hand, it is reasonable to infer that the definition assumes the use of two hands. The administrative law judge appears to acknowledge this basic premise when he states that the plaintiff could return to her past work as a data entry clerk if the job were modified so that she did not have to use her left hand or arm “as more than a guide.” Counsel for the commissioner was unable at oral argument to identify any authority allowing the commissioner to find that a claimant could return to her past relevant work when she could only do so if that work were modified to accommodate her limitations. My research has located no statutory, regulatory or case law support for this gloss on the Step 4 evaluation procedure. Indeed, this approach would appear to open a loophole in the sequential evaluation procedure so wide that most benefit applicants would fall through it. Many jobs could conceivably be modified to allow a claimant who has developed physical limitations to return to those jobs. Whether any employer would choose to employ the individual under those conditions is an entirely different, but highly relevant, question. Here, the appropriate inquiry would

be whether there are other jobs which the plaintiff could perform given the limited use of her left arm found by the administrative law judge to be available. That inquiry is made at Step 5 of the sequential evaluation procedure, which the administrative law judge never reached.

The record provides substantial evidentiary support only for the conclusion that the plaintiff, given the physical limitations found by the administrative law judge, could not return to her past relevant work as that work is reasonably defined and understood to exist in the national economy. Accordingly, the case must be remanded for consideration at Step 5.

#### **D. Additional Evidence**

If the court adopts my recommendation that this matter be remanded for further proceedings before the commissioner, the plaintiff's argument concerning the additional medical records that she submitted to the Appeals Council is moot. Those records will be available for consideration by the administrative law judge on remand, for whatever relevance they may have to a Step 5 determination.

#### **Conclusion**

For the foregoing reasons, I recommend that the commissioner's decision be **VACATED** and the cause **REMANDED** for further proceedings consistent herewith.

#### **NOTICE**

*A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.*

*Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.*

Date this 9th day of April, 2001.

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David M. Cohen  
United States Magistrate Judge

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